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SUPREME COURT OF THE UNITED STATES.

No. ~~178~~. 99

ALEXANDER McANDREW AND SAMUEL WANN, ALIENS, &c., PLAINTIFFS IN ERROR,

vs.

ISAAC THATCHER, CHARLES W. SCUDDER, AND SAMUEL C. CROCKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Isaac Thatcher, Charles W. Scudder, and Samuel C. Crocker, citizens of the State of Massachusetts, plaintiff, and Alexander McAndrew and Samuel Wann, aliens, &c., defendants, a manifest error hath happened, to the great damage of the said defendants, as is said, and as appears by their complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceeding aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and customs of the United States ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-second day of December, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 UNITED STATES OF AMERICA,
Southern District of New York:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office, and a return to the writ of error hereto annexed.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fourth day of December, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the said United States the eighty-eighth. [SEAL.]

KENNETH G. WHITE, *Clerk.*

Filed Dec. 22, 1862.

3 In the circuit court of the United States of America for the southern district of New York, in the second circuit.

As yet of the term of April, in the year of our Lord one thousand eight hundred and sixty. Witness Roger B. Taney, chief justice.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Isaac Thatcher, Charles W. Scudder, and Samuel L. Crocker, citizens of the State of Massachusetts, putin their place George De Forest Lord, their

attorney, against Alexander McAndrew and Samuel Wann, aliens, subjects of the Queen of Great Britain, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Alexander McAndrew and Samuel Wann, defendants in this suit, put in their place Alexander Hamilton, jr., their att'y, at the suit of Isaac Thatcher, &c., plaintiff therein.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that on the day of June, of this same term of
4 April, came Isaac Thatcher, Charles W. Scudder and Samuel L. Crocker, citizens of the State of Massachusetts, by George De Forest Lord, their attorney, brought in their bill against Alexander McAndrew and Samuel Wann, aliens and subjects of the Queen of Great Britain, in a plea of trespass on the case upon promises, which bill is as follows:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Isaac Thatcher, Charles W. Scudder and Samuel L. Crocker, citizens of Massachusetts, plaintiffs, complain of Alexander McAndrew and Samuel Wann, aliens, subjects of the Queen of Great Britain, defendants, being in the custody, &c., for that whereas the plaintiffs were, at the times hereinafter mentioned, owners of the ship Rachel; and whereas the said ship heretofore, to wit, on the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and fifty-nine, set sail from ports beyond sea, namely, the port of Liverpool, in England, having on board divers merchandise belonging to and consigned to sundry persons, bound to the port of New York, to be carried there in the said ship and there delivered, the dangers of the seas excepted; and whereas among the said merchandises were divers goods and merchandises of the defendants of great value, to wit,
5 of the value of fifteen thousand dollars, and also divers goods and merchandises of great value, to wit, of the value of fifteen thousand dollars, consigned to the said defendants; and whereas, in the prosecution of the said voyage, the said ship, with the said cargo on board, heretofore, to wit, on the twenty-first day of September, in the year last aforesaid, was, by the force and violence of the wind and sea, and by storm and tempest, and the dangers of the sea, forced on a certain bank, shoal and reef, known as west bank, on the high seas, and the said ship and all her cargo thereby became and were, and for a long time continued to be, in great peril, and in danger of being totally lost; and whereas, in endeavoring to save the said ship and cargo, various damages were intentionally and necessarily done to the said ship and parts of her cargo, and various expenses incurred in the endeavor to save the said ship and cargo, and in and about and in consequence of the same, amounting in all to a large sum of money, namely, fifteen thousand dollars, to wit, on the day and year, and at the southern district of New York aforesaid; and whereas, by means thereof, the said ship and her cargo, and the said
6 goods and merchandise of the defendants, and the goods consigned to the defendants, were saved, and the said last-mentioned goods and merchandise were delivered to and accepted by them at the port of New York on the day and year last aforesaid; and whereas the value of the ship, freight and cargo was of large amount, namely, of the ship, six thousand seven hundred dollars; of the freight, three hundred and ninety dollars; of the cargo, thirty-five thousand dollars, namely, at the city of New York, for the southern district of New York aforesaid, whereby the defendants became liable to pay the freight on the said goods and merchandise so de-

livered to them, namely, two hundred dollars, and also their rateable contribution and proportion, by way of general average, for and on account of the damages and expenses in and about the saving of the said ship and of the said cargo, and the adjustment of the said average; and whereas a statement thereof was then and there made, whereby the amount, proportion and sum to be contributed by the defendants, in respect of the cargo so accepted by them, was found to be a large sum of money, namely, three thousand five hundred dollars, of which the defendants then and there had notice,
7 to wit, on the day and year, and at the place last aforesaid, by reason whereof the defendants then and there became liable to pay to the plaintiffs the freight aforesaid, and also their contribution, proportion and contributory sums of general average aforesaid, and being so liable, the defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the city of New York, in the southern district aforesaid, and then and there faithfully promised to pay the plaintiffs the said freight and proportion, contribution, and contributory sum of general average whenever they should be thereunto afterwards requested. Yet the defendants their promise aforesaid, in form aforesaid made, not regarding, although often by the plaintiffs requested, have not paid the said freight, and proportion, contribution, and contributory sum of general average, nor any part thereof, to the damage of the plaintiffs five thousand dollars, and thereof the plaintiffs bring suit, &c.

And the said defendants, by Alexander Hamilton, jr., their attorney, come and defend the wrong and injury, when, &c., and say that they did not undertake and promise in manner and form as the said plaintiffs
8 have above thereof complained against them, and of this they put themselves upon the country, and the said plaintiffs do the like.

Therefore, let a jury thereupon come before the judges of this court, at the city of New York, on the third Monday of October next, to try the issue aforesaid so joined, &c., each of whom, and by whom, &c., and who neither, &c., because as well, &c., and day is given to the parties aforesaid at the same place. At which day and place last aforesaid, before the honorable Shipman, one of the judges of this court, at a stated term thereof, at the city of New York, at the court-house, &c., come the said parties, by their respective attornies aforesaid, and the jurors of the jury so ordered as aforesaid, being summoned, also come and to try the issue aforesaid, and duly elected, tried and sworn; and the jurors aforesaid, on their oath aforesaid, do say that the defendants did undertake and promise in manner and form as the plaintiffs have above thereof declared against them, and they assess the damages of the plaintiffs, by reason of the non-performance of the said promises, at three thousand four hundred and eighty-four dollars and twenty cents damages, besides their costs, and for those costs, six cents. And
9 because the court will advise, &c., day is given to the parties aforesaid, at the place aforesaid, until the third Monday of April next, at a stated term, &c., to hear the judgment, &c.

And afterwards, the process aforesaid, between the parties aforesaid, is continued until the third Monday of October, in the year of our Lord one thousand eight hundred and sixty-two, because the judges had not yet advised, &c.

And now, at this day, namely, the third Monday of October last aforesaid, before the judges of this court, at the court-house, &c., in the city of New York, come the plaintiffs, by their attorney aforesaid; and it is thereupon considered that the plaintiffs do recover against the defendants the damages aforesaid, and also the costs aforesaid, and for their costs of increase, including interest on the said amount, the further sum of five hundred and fifty $\frac{66}{100}$ dollars, which damages and costs, in the whole, amount to four

thousand and thirty-four dollars and eighty-six cents; and the defendants in mercy, &c.

Judgment signed this 15th day of December, A. D. 1862.

R. E. STILWELL, *Dep. Clerk.*

10 Filed Dec. 15, 1862.

11 Circuit court of the United States for the southern district of New York.

ISAAC THATCHER and others
vs.
ALEXANDER McANDREW and SAMUEL WANN. } Bill of exceptions.

Be it remembered, that on the trial of the issue aforesaid the plaintiffs' counsel, to maintain and prove the said issue on his part, introduced the following testimony, viz:

At the request of the plaintiffs, the defendants admitted that the plaintiffs were owners of the ship Rachel, as alleged in the declaration.

Also, that the defendants were the consignees (under a bill of lading consigning to order) of the goods mentioned in the manifest of the said ship, as follows:

"Fifty-four boxes liquorice paste, shipped by McAndrew and Cunningham, consigned to order;" also 350 boxes liquorice paste.

The plaintiffs then, by consent of the defendants, read in evidence the statement, dated September 29, 1859, of Seth H. Hamblin, master of the said ship aforesaid, also signed by the mate and three seaman, to have the same effect as if given in evidence on the trial, as follows:

"That on the twenty-ninth day of July, 1859, he, the said Seth H. Hamblin, set sail, and departed in and with the said vessel, as master thereof, from Liverpool, having on board the said vessel a cargo of
12 general merchandise, and bound for the port of New York; that the said vessel was then stout, staunch and strong; that they proceeded on the voyage aforesaid, making and trimming sail as occasion required, the pumps being properly attended to, and without any material occurrence worthy of mention herein, except the loss of the foreyard, which was carried away in the slings in a squall, which struck the ship on the 30th of August; and on 21st of September, at 6 a. m., took a pilot on board, and at 8 a. m. made the highlands; at 10 a. m. passed Sandy Hook; at 11 a. m. a strong gale blowing from the east by north, ship heading north by east, under charge of the pilot, struck the bottom on the west bank; immediately let go the port anchor, and paid out 45 fathoms chain; ship hard and fast; sounded the pumps and found the ship making water; pumps kept constantly at work. Septemper 22d came in with strong gales, and thick and rainy weather; at 2 p. m. steam-tug Screamer came alongside and offered assistance, which was accepted, and the master made an agreement with her to tow him off for the sum of $1,000, she to find a hawser; if unsuccessful he was to receive nothing; which terms were agreed to, and the steamer then passed her hawser and made fast, and then commenced to tug, slipped the anchor and forty-five fathoms chain. Steamer continued to work, but without success, as the ship moved but little; she, the Screamer, then set a signal for another steamer, which was answered, and the steamer "Huntress" came to her aid, passing her hawser to the Screamer, when both
13 steamers laid their strain on the ship, but could not start her. At this time another steamer came alongside and made her hawser fast to the after bits of the Rachel, and in tugging parted the hawser, and tore out the chock; the steamer came alongside and reclaimed the broken hawser left on board. The Screamer and Huntress continued their efforts for about

two hours, the ship meantime striking heavily, when finding their endeavours fruitless, the ship being deeply imbedded in the sand, cast off their hawsers and left; the ship, in the meantime, making water freely, and the pumps kept constantly at work. At 5.30 p. m. sounded the pumps and found two and a half feet of water; at 6 p. m. Captain Hamblin left for the city to obtain advice and assistance; at 7.30 p. m. sounded the pumps and found three feet of water; at twelve, midnight, sounded and found twelve feet water; at 4 a. m. found fourteen and a half feet water and increasing fast, the ship laboring and rolling in the sand heavily. At 9 a. m. the steamer S. A. Stevens, with the schooner Ringold in tow, came down with the New York underwriters' agent, Capt. Merrit on board, and, with steam-pump and wrecking apparatus, commenced laying out a cable, and hove taut on it, and getting ready to rig the steam-pump and discharge cargo.

Sept. 23 commences with heavy weather, ship laboring and working in the sand, and full of water; the master returned to the ship at 2 p. m. in the steamer S A. Stevens, hired for that purpose; steam-pump at work, but could not free her; commenced sending down yards and spars, and to
14 discharge cargo in lighters; in discharging, lost overboard one case liquorice paste. The crew remained on board, and were employed in saving property, and doing general duty throughout the whole of this day; were employed in discharging into lighters and saving materials; tide ebbing and flowing into the ship.

Sept. 24, another steam-pump arrived, in the schooner Norma, the other pump being at work at low water, to facilitate the discharge of cargo. The day was consumed in discharging cargo into lighters and saving materials. Kept the cable taut, ship hard and fast, and tide flowing in and out.

September 25 and 26 were employed discharging cargo into lighters and saving ship materials. The steam-pumps, on the latter day, were taken down and brought away, having finished discharging cargo, leaving the underwriters' cables and anchors out. Ship fast settling in the sand, and tide ebbing and flowing in her.

27th September, at 1 a. m., Captain Morris, the Boston underwriters' agent, came on board and took charge of the ship. At 9 a. m. the crew came aft and refused to do duty. Day consumed in saving cargo and materials.

28th. Steamer Satellite came alongside with men, as the ship's crew had all left, and then returned to the city for oil casks to float the ship off. Ninety casks were received on board the vessel, and part of them studded down the next day.

September 29, received on board 250 oil casks, which were studded down, but without benefit; employed in saving ship's materials, under the
15 direction of Captain Morris, the underwriters' agent.

30th. Heavy sea breaking over the ship, working very much, and apparently breaking up and settling in the sand. Sounded in the morning in the fore-hatch, and found eighteen feet water; in the main-hatch, eighteen feet water; in the after-hatch, nineteen feet water; and the top of the house, on deck, working up. By order of Captain Morris, the main-topmast was cut away, and the wreck cleared up. At 2 p. m. steamer Satellite left the ship with Captain Morris and a number of the laborers, and the next day he returned to the ship, and said to Captain Hamblin, in effect, that there was no more use of his remaining by the ship any longer, and that he had better leave her; upon which Captain Hamblin thereupon abandoned the ship, and left her upon the west bank, where she now lies hard and fast in the sand, with the tide ebbing and flowing in, and in command of the agent of the Boston underwriters.

The plaintiff then called as a witness,

Griffith Morris, who testified: I came to the said ship Rachel when she

lay on the west bank, near the harbor of New York; Captain Hamblin was, at the time I came, in charge of the ship; when I first went to her I did not know any cargo that was on board, nor did I until the ship was got off and brought up to New York; I knew there were casks and other things in the ship, but I did not know what they were; I discovered this a few days after I got to the ship; I proceeded with endeavours to save. At no time
16 was the ship given up as hopeless, nor did we at any time intermit our endeavours to relieve the ship. No cargo was discharged from her into lighters while I worked at her. When I first got to the ship she was heading about southwest, and heeled over on her port side. I stripped the ship to her lower masts; this, with the aid of oil casks, caused her to right. The weather was favorable; the wind, about all the time, was westerly. Got the ship off on the eleventh day of November; continued working at her all the while up to that time. The ship was then brought up to the Empire stores, a few slips above the Fulton street ferry, and afterwards was taken to the marine railway, at Hunter's Point, Brooklyn. The cargo that was then in her was discharged at Hunter's Point. Crocker, Wood & Co. were agents of the ship here at the time. The ship was got off the bank by anchors and purchasess; she would start a little at every flood-tide; would go about her length. When she was nearly off the steamers Satellite and Hercules took hold of her and hauled her off the bank. I did not send for tugs until she was nearly off. We were some six weeks in getting her off.

Cross-examined.

He said: I was employed by the underwriters on the ship at Boston; Col. Adams, president of the New England Marine Insurance Company, was the one who communicated with me. I was at New York when I was first engaged. Col. Adams telegraphed me to go to the ship and get her off if I could. I went on board the Rachel on the night of the twenty-sixth day of
17 September; I received the telegram that afternoon. The steam-pumps and parties previously employed in saving the property had left; at that time the ship was heeled over to port seven or eight streaks or more, the water washing up to the hatches. At high tide the water rose over the lee-rail. The water in her, at the hatches, was eighteen feet deep, and at the stern nineteen feet. Her top works appeared to be good. She lay hard and fast in the hold she had made by rolling; the tide ebbed and flowed in her. At nine at night, when I first went on board, no work was going on. The next day the crew refused to work; they wanted to go to New York. I tried to make an agreement with them; they refused. I went to New York the next day, the 27th of September, got a gang of men to supply their places. The men I hired worked until the ship got off. When the ship was brought up she lay a day or two at the Empire stores; then was taken to Hunter's Point, put on the marine railway and examined; the keel was out and gone. She had sand in her; also a quantity of salt-bags, mostly empty; the remnant of the cargo was taken out after she was on the railway. I did not get any salt out of the ship.

Again examined for the plaintiffs, he testified: We also found casks of soda ash in the lower hold, abaft the foremast, also some cases of liquorice paste. I found nothing there to speak of; a few pieces of iron, part of her cargo. The cargo in her was discharged after she was put on the railway at Hunter's Point.

Ferdinand A. Crocker, a witness called by the plaintiffs, certified
18 that he was one of the firm of Crocker, Wood & Co.; that on the occasion in question, his firm was consignees of the ship; she was put in our charge by Captain Hamblin, the master; as the cargo was dis-

charged from the vessel, on the bank, into lighters, it was sent up by the master and stored at Wheeler's stores, at the Atlantic dock, Brooklyn, in our name. All the cargo that came up from the ship, while she lay on the bank, that part of the cargo which was discharged from the ship on the railway, was in our hands. In like manner the consignees of the cargo received it by orders from us, after obtaining a permit from the custom-house. After they signed the average bond we gave them the orders. The articles discharged at Hunter's Point were not stored. We gave an order for the liquorice paste discharged there, to the defendants; there were twelve cases liquorice paste delivered there to the defendants. There had been other liquorice paste which came by the lighters, delivered to the defendants previous to this—in all three hundred and ninety-one packages; they paid us the freight on the whole of the consignment. The soda ash discharged from the ship at Hunter's Point was much melted out; the casks were broken and stripped off, and the contents were in large lumps; the casks had been apparently broken in the rolling of the vessel on the bank. There was a quantity of salt bags, mostly empty, but some with a little salt; there were 4,782 bags; they were sold on the dock there for $189; know not their value; they were not damaged, except that they were wet and dirty. The soda
19 ash could not be identified as to packages, and were sold in a lot, on the wharf at Hunter's Point. There were also delivered there several pieces of bar iron, part of the cargo, some three or four pieces in the whole. Our firm paid all the bills, and collected the average.

Cross-examined.

Said: We delivered the twelve cases damaged liquorice paste to the defendants; they afterwards sold them and sent us a check for the proceeds, which are placed to their credit, and no other cargo but these damaged cases was delivered to the defendants from the ship at Hunter's Point. Soda ash is usually imported in casks. Our firm acted as agents of the owners of the ship, and of all whom it should concern, on the consignment of the master. Saw none of the owners; a man named Bangs was sent on here by the owners, but he had nothing to do; we did the whole. The liquorice paste delivered from the ship at Hunter's Point was damaged. Had an interview with Captain Merrit, who had been working at the ship; after the cargo, which had been discharged in the lighters, had come up, he called on me and wished to know if we wished him to continue his efforts to get the ship off and bring her up to town, stating that the steam-pump and other apparatus on board would be very expensive and we must be responsible for its hire, and for its value in case it were lost. We objected to do this, and told him he might remove it or leave it until we should give further instructions. Recollect no allusion to oil casks. The day after this conversation Captain Morris (the witness) took charge of the ship.

William Augustus Walker, called by the plaintiffs, testified:

I am of the firm of Lawson & Walker, average adjusters and insurance brokers, at New York; we did the adjustment of the Rachel; have the original average bond, signed by the consignees of the cargo.

The instrument is produced and is as follows:

Whereas the ship Rachel, whereof Hamblin is master, having on
20 board a cargo of merchandise, sailed from the port of Liverpool, bound for New York, and in due prosecution of her said voyage, while in charge of a pilot, stranded on the west bank. Steamers attempted to tow her off, but unsuccessful. The master obtained assistance from the city, and the board of underwriters sent their agent with lighters, steam-pumps, &c. The ship lies now full of water; part of the cargo is melted, part

saved in a damaged condition; brought to town by lighters, and deposited in the public stores, by which means certain losses and expenses have been incurred, and other expenses hereafter may be incurred in consequence thereof, which (according to the usage of this port) constitutes a general average to be apportioned on the said vessel, her earnings as freight, and the cargo on board:

Now we, the subscribers, owners, consignees, agents or attorneys of certain consignees of said cargo, do hereby, for ourselves, our executors and administrators, severally and respectively, but not jointly or one for the others, covenant and agree to and with Messrs. Crocker, Wood & Co., that the loss and damage aforesaid, and other incidental expenses thereon, as shall be made to appear to be due from us, the subscribers to these presents, either as owners, consignees, agents or attorneys of certain consignees of said cargo, shall be paid by us, respectively, according to our parts or shares in the said goods, as shall belong or be consigned to any person or persons with whom we are co-partners, agents or attorneys, or in any manner concerned therein, provided such losses and expenses afore mentioned be stated and apportioned by James Lawson and William Augustus Walker, adjusters of averages and insurance brokers, agreeably to the established usage and laws of this State in similar cases; and for the true performance of all and singular the premises, we do severally hereby bind ourselves and our heirs, executors and admministrators, to the said Messrs. Crocker, Wood & Co., in the penal sum of five thousand dollars, lawful money of the United States.

In witness whereof, we have to these presents set our hands in the city of New York this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and fifty-nine.

21

Signature of consignees.	Merchandise.	Value. £	*s.*	*d.*
Morgan & Smith	12 casks	10	13	7
Gillan Brothers, by C. Atty	11 cases	340	1	10
Milton & Brume	50 p'k'g's	318	14	10
I. R. & W. C. Fowler	57 p'k'g's	442	3	6
John C. Jackson	114 p'k'g's	853	4	10
Collins & Co.	588 bars iron	261	19	0
Phelps, Dodge & Co.	20 lbs. tin	1,892	2	0
Morrison, Randall & Co.	salt	611	5	4
Mead & Bell	spike iron	180	0	0
John L. Thompson, Sons & Co., by David Morris & Co.	52 cts. soda ash	408	10	11
J. Mc Andrew & Wann	liquorice paste	1,857	17	5

Mr. Lawson and myself stated the average; he procured the bills of the expenditures, also a valuation of the ship, as she was; also the value of the cargo here, from the respective consignees. The valuation of the ship was by experts.

We stated the average according to the law and usage of this place, as we understood it; and as to the question involved in this cause, we stated it according to our opinion.

Cross-examined.

We estimated the value of the ship at $5,000.

22 The general average statement by James Lawson and the witness was then given in evidence, from which it appears that the several amounts following were allowed, as follows :

General average, including all the expenses, until the delivery of the remnant of the cargo at Hunter's Point		$10,389 71
Special charges on freight		185 82
Charges on vessel		2,101 34
Charged to owners		1,095 20

The contributary interest was stated as follows :

Vessel valued on arrival	$5,000 00	
" estimated value of materials saved	1,538 00	
" amount made good	220 00	
		$6,758 00
Freight earned	978 06	
" less special charges	185 82	
		396 12
Cargo, including empty salt bags, $127 20, and soda ash not identified, $38 64		$31,754 66

That the amount of cargo of the defendants was $10,576 20, and the apportionment of the contribution to be made by them was $3,363 89, (three thousand three hundred and sixty-three dollars and eighty-nine cents.)

23 It was admitted by the plaintiffs that the sales of 12 cases liquorice paste, damaged and sold, (brought up in ship,) was $132 50

Sales of all liquorice paste consigned to or belonging to defendants	11,747 28
Amount expended by Captain Morris after he took charge of the ship on the west bank, until she was placed on the railway at Hunter's Point, with the damaged cargo on board, of which sales amounted to $298 34, as under	6,884 16
Sales of cargo in damaged state, taken from the ship and brought up in lighters by Captain Merritt	24,600 00

Sales of damaged cargo, brought in the ship to Hunter's Point:

Empty salt-bags	$127 20	
Soda ash unidentified	38 64	
12 cases damaged liquorice paste	132 50	
		298 34
Ship valued on railway at Hunter's Point, by experts		5,000 00
The plaintiffs then proved notice of the apportionment, which is dated February 18, 1860, to the defendants on the 5th of May, and then refused to pay it, and claimed a verdict for such apportioned sum		3,363 89
Interest from 5th of May to 22d of Nov		120 31
In all		3,484 20

24 The average statement is to be considered in evidence, and the whole, or agreed parts, may be read as parts of this case, being previously notified by the party intending to use them.

The plaintiffs rested their case.

The defendants called as a witness,

Israel J. Merritt, who testified: In 1859 I was employed at the ship Rachel, stranded on the west bank; I was engaged in the office of the Atlantic Insurance Company, in New York; was talking with Mr. Jones,

president of that office, on the subject of this ship, after news of her stranding; one of the consignees was present; took measures thereupon to save the vessel and cargo; removed all the cargo we could get hold of; still the vessel did not float. The cargo was sent up to the city in lighters. After the cargo was nearly out I came to New York to see Crocker, Wood & Co., and the secretary of the board of underwriters, at New York. My employers told Crocker, Wood & Co., in presence of Captain Bangs, that I wanted oil-casks to float the ship, to bring her to New York; that without them I could not save the ship. They, one or the other, said the ship was not worth the expense. I left them, and about noon of the 26th of September sent
25 my foreman down to the ship to take out our steam-pump, cables, &c.

Cross-examined.

He said that it was at this time I spoke to Mr. Crocker about the steam-pumps, &c.; do not differ from Mr. Crocker's statement, except that I spoke to him of oil-casks. This conversation was on the 26th of September, and after this I withdrew the steam-pumps, materials, &c., except a cable which was left, and Mr. Crocker agreed to be responsible for it.

The defendants' counsel then read in evidence to the jury the following letters, viz:

OFFICE OF THE NEW ENG. MUT. MAR. INS. CO.,
Boston, May 5, 1860.

A. OGDEN, Esq., *Vice Pres't Orient Ins. Co:*

DEAR SIR: I am informed by Capt. Morris that you decline paying the general average claim on goods per the ship Rachel. The claim belongs to the underwriters on the ship, they having paid a total loss on her, viz: The Neptune, Boylston Equitable Ins Cos., and ourselves. We are sorry that you are not disposed to pay your proportion of the claim without a suit, all the other offices having paid. But we have no other alternative, and have directed Capt. Morris to hand the claim to a lawyer, to have it legally adjusted.

Yours truly,

J. H. ADAMS, *Pres't.*

26 OFFICE OF THE ORIENT MUT. INS. CO.,
New York, May 11, 1860.

JOS H ADAMS, Esq., *Pres't, &c.:*

DEAR SIR: Your letter of the 5th inst., in relation to the ship "Rachel," has been received. Under advice of counsel, we do not consider that you have legally or equitably a claim against the parties concerned in the cargo, for contribution to your expenses for saving the ship. If advised otherwise, you must of course commence your action against the owners of the cargo to enforce your supposed rights. For the sake of peace, we might have been willing to entertain propositions for a compromise; but if you are not disposed to meet us on this ground, there is no alternative for you but legal proceedings, save the abandonment of all claims whatever.

Yours truly,

ALFRED OGDEN, *V. Pres't.*

The defendants' counsel then rested.

The defendants' counsel then presented the following proposition of law to the court, and requested the court to charge the jury accordingly:

First. That inasmuch as expenditures are not to be brought into
27 general average, unless they are of an extraordinary character, and incurred from the joint benefit of ship and cargo; and as in this case

the cargo had undoubtedly been stored in safety at its place of destination before the expenses to save the ship, for which this action is brought, or any part of them, had been incurred, the plaintiffs were not entitled to recover.

Second. That the stranding in this case was involuntary, and, as a cause of loss or expense, did not give rise to a claim in general average, and that the plaintiffs were not therefore entitled to recover.

Third. That as the expenditures for saving the ship were incurred after the master had abandoned her, and by the direction of the underwriters in the ship, all such expenses were incurred with a view to its preservation alone, and could not possibly benefit the cargo or affect the freight in any way, and therefore such expenses could not be brought into general average, and that therefore the plaintiffs were not entitled to recover.

Fourth. That as the cargo was no longer at risk, and not connected with the voyage or adventure, which was ended, so far as the cargo was concerned, no principle of general average can be involved to bring it into contribution for the expenses of saving the ship. That the fact that
28 a remnant of the cargo was on board, and found in her hull after the vessel was on the railway, amounting only to about $\frac{1}{144}$ part of the whole, comes plainly within the rule "de minimus," and cannot, with justice, be said to effect the separation of ship and cargo.

Fifth. That in contemplation of law the adventure in this case was ended, and that the efforts to save the ship did not form part of a continuous series of measures for the common benefit, as it is proved that these efforts were not made until after the master had abandoned the vessel, and the consignees had refused to incur further expenses to save her; and further, that these efforts were made by the underwriters on the ship, through an agent acting under their orders.

Sixth. That in judgment of law the efforts to save the ship in this case were not made with a view to save the adventure, inasmuch as the voyage or adventure was terminated absolutely as the cargo, by its safe arrival, and substantially as the ship, which was stranded in the lower bay of the port of New York, which was her port of destination.

Seventh. That as the vessel in this case, after the cargo was taken out, did not float and was in fact a total loss—the expense of floating her
29 exceeding her value when raised—the expenses incurred in floating the ship cannot be brought into contribution in general average, and the plaintiffs are therefore not entitled to recover.

Eighth. That the average adjustment should be restated; the expenses and sacrifices on the first day with steam-tugs, to rescue ship and cargo, carried into general average; while the expenses of saving cargo and ship should be charged to the separate interest benefited thereby, and that as nothing in that case would be due from the defendants to the plaintiffs in this suit, that a verdict should accordingly be rendered in their favor.

The court then charged the jury as follows:

This is perhaps a close case, but we are inclined to think that, on principle, the cargo of the defendants is bound to contribute in general average to the expenses of saving the vessel.

The evidence showed that the cargo was discharged into lighters to relieve the vessel, and the delivery then at the port of destination was attributable to the accident of the proximity of the port. The cargo was at the risk and responsibility of the ship, until delivered by her consignees on the receiving the bond for average contribution. That the expenses
30 incurred in attempting to relieve the ship, including lightering and saving cargo, are properly chargeable in the general average.

That it was, however, claimed by the defendants that after the discharge of the cargo on the lighters, and separation from the ship, the safety of the cargo no longer depended on the saving of the vessel, and hence there was no longer any common peril impending or benefit derived from the expenses incurred; that the evidence showed, that by the accident which occasioned stranding of the vessel, both vessel and cargo were exposed to one common danger, and the expenses incurred were incurred with a view to the safety of both, and of course for their common benefit. Steam-tugs were employed and efforts made to start the vessel from her sand-bed—steam-pumps and wrecking apparatus used. These efforts failing, they commenced sending down yards and spars and placing cargo into lighters. All these expenses were incurred, and efforts made by the master, who represented the interests of all concerned. That these efforts were continued by the master until and after he was joined by Captain Morris, the agent sent by the underwriters of the ship, who then took charge of the business. If the
31 consignees of the cargo had accepted it thus delivered at the sides of the stranded ship, the separation would have been complete, and it would have been no longer connected with the danger and its accidents, and from this period the expenses would not have been subjects of general average contribution.

But the evidence shows that the cargo continued as a part of an adventure not yet terminated. If any damage had happened to it in the transfer to the lighters or in the conveyance to the port, the loss would have been the subject of general average, and the ship liable for its share, and in this sense the cargo is still interested in the safety of the ship.

There is a difficulty in laying down any general rule by which to determine the measure of expenses the master or owners of a vessel stranded by a peril of the sea may incur, and to which the cargo saved must contribute. The measure of them must depend upon the exercise of sound judgment and good faith under all the circumstances. No fixed amount can be settled in advance. It cannot be said in this case that the owners should have ceased his efforts when the cargo was saved, or that he forfeited his right to the contribution by the continuance of them. To which
32 charge as to the matters of law therein stated, and every of them, the defendants' counsel excepted.

The judge declined, as to the points requested by the defendants to be charged as law, to make any other or further charge than he had already made. To which refusal as to each request, respectively, the defendants' counsel excepted.

Neither party requested to go to the jury on any of the matters of fact suggested in the charge of the court.

And thereupon the jury found for the plaintiffs, and assessed their damage as by the record of the verdict, on reference thereto, fully appears; and inasmuch as the said several matters so produced and given in evidence on the part of the said defendants, and by their counsel as aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said defendants did then and there propose their aforesaid exceptions to the said judge, and requested him to seal this bill of exceptions, containing the said several matters as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said judge, at the request of the said counsel, did put
33 his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and sixty-one.

Allowed.

WM. D. SHIPMAN, *Judge.*

34 Filed March 2, 1863.

35 Circuit court of the United States of America, for the southern district of New York, in the second circuit.

ALEXANDER MCANDREW and SAMUEL WANN, aliens, &c.,
vs.
ISAAC THATCHER, CHARLES W. SCUDDER, and SAMUEL C. CROCKER, citizens of the State of Massachusetts.
} Bond for cost.

Know all men by these presents, that we, Leopold Bierwirth, of the city of Brooklyn, and Alexander Hamilton, jr., of the city of New York, are held and firmly bound unto the above-named Isaac Thatcher, Ch's W. Scudder, and Sam'l C. Crocker, in the sum of six thousand dollars, to be paid to the said plaintiffs, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-two.

Whereas the above-named defendants have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named defendants shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make the same good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

LEOPOLD BIERWIRTH. [L. S.]
ALEX. HAMILTON, JR. [L. S.]

Sealed and delivered, and taken and acknowledged, this 19th day of Dec'r, 1862, before me.

NATH'L P. ROGERS, [L. S.]
Notary Public.

36 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Leopold Bierwirth and Alexander Hamilton, jr., the allegors in the within bond named, being duly sworn, depose and say, and each for himself deposes and says, that he is worth the sum of six thousand dollars over and above all his just debts and liabilities.

LEOPOLD BIERWIRTH.
ALEX. HAMILTON, JR.

Sworn to this 19th day of Dec'r, A. D. 1862, before me.

NATH'L P. ROGERS, [L. S.]
Notary Public.

Filed this 22d day of Dec'r, 1862.

I approve of the within bond and sureties. Dec. 22, 1862.
N. K. HALL, *Dis't Judge, acting in St. N. Y.*

37 By the honorable Nathan K. Hall, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Isaac Thatcher, Charles W. Scudder, and Samuel C. Crocker, citizens of the State of Massachusetts:

Whereas Alexander McAndrew and Samuel Wann, aliens, &c., have lately issued out of the Supreme Court of the United States a writ of error,

directed to the judge of the circuit court of the United States for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between Isaac Thatcher, Charles W. Scudder, and Samuel C. Crocker, citizens of the State of Massachusetts, plaintiffs, and the said Alexander McAndrew and Samuel Wann, aliens, &c., defendants, a manifest error hath happened, to the great damage of the said Alexander McAndrew and Samuel Wann:

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the Capitol, at the city of Washington, on the first Monday of Dec'r next: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of Dec'r next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 22d day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

N. K. HALL,
District Judge of the U. States, assigned to duty and acting in the Southern District of New York.

Filed Dec. 23, 1862.

Supreme Court of the United States.

ALEXANDER McANDREW AND SAMUEL WANN,
ALIENS, &C.,

Plaintiffs in Error,

against

ISAAC THATCHER, CHARLES W. SCUDDER AND SAMUEL C. CROCKER.

Defendants in Error.

In Error to the Circuit Court of the United States, for the Southern District of New York.

Statement of Facts and Points,

OF PLAINTIFFS IN ERROR.

ALEX. HAMILTON, JR.,
Attorney.

NEW YORK:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU ST., COR. LIBERTY.

1865.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

Alexander McAndrew and Samuel Wann, aliens, &c.,
Plaintiffs in Error,

vs.

Isaac Thatcher, Charles W. Scudder, and Samuel C. Crocker,
Defendants in Error.

Statement and Brief of Plaintiffs in Error

This action was tried in the Circuit Court of the United States, in and for the Southern District of New York, in October Term, 1862, before the Hon. Wm. D. Shipman, one of the Justices of the said Court, and a jury.

The plaintiffs (below) claimed to recover from the defendants (below) the sum of three thousand five hundred dollars, as and for a contribution in general average, under the following circumstances:

The plaintiffs (below), citizens of Massachusetts, were the owners of the ship *Rachel*, which sailed from Liverpool July 29, 1859, bound to New York, with a general cargo, consigned to sundry persons, and, as part of it, about 400 boxes of liquorice paste, consigned to the defendants (below), aliens and residents of New York, of the value of about $15,000.

Record, p. 2.

Nothing material occurred on the voyage, until the ship took a pilot off Sandy Hook, on the 21st September, and on the same morning passed Sandy Hook, and about midday, in a gale from the eastward, struck on the West Bank, in the Lower Bay of the harbor of New York.

At 2 P. M., September 22, nautical time, or the afternoon of 21st September, civil time, the steamtug *Screamer* came alongside, and afterwards the tug *Huntress*, and endeavored, with hawsers, to pull the ship off, but all their endeavors were fruitless, the ship striking heavily. At 4 A.M., the next morning, the vessel "had 14½ feet water, and increasing fast, ship laboring and rolling in the sand heavily."

Testimony of Hamblin, master, witness for plaintiffs.
Rec'd, pp. 4, 5.
" fols. 12, 13.

About five hours later, at 9 A. M., September 22, the steamer *S. A. Stevens*, with the schooner *Ringold* in tow, came down with the New York underwriters' agent, Capt. Merritt, on board, with steam pumps and wrecking apparatus, and commenced laying out cable, &c. In the afternoon, "steam pumps at work, but could not free her."

Hamblin's testimony.
Rec'd, fol. 14.

Capt. Merritt states: "In 1859, I was employed in the "office of Atlantic Insurance Company; was talking with "Mr. Jones, President of the company, about the ship, after "news of her stranding; one of the consignees was present; "took measures, thereupon, to save vessel and cargo; re-"moved all the cargo we could get hold of, still the vessel "did not float; the cargo was sent up to the city in lighters."

Rec'd, p. 10, fol. 24.

Capt. Merritt thus acted for all concerned, as well the consignees of the ship as the underwriters on cargo, and went down accordingly, Sept. 22, with his steam pumps and apparatus.

His efforts to save ship and cargo were continued through

Sept. 23, 24, and 25, up to Sept. 26. On that day, Capt. Hamblin, the master, (plaintiffs' witness,) says:

"The steam pumps on the latter day" (Sept. 26) "were "taken down and brought away, having finished discharg- "ing cargo, leaving the underwriters' cables and anchors "out; ship fast settling in the sand, and tide ebbing and "flowing in her."

Hamblin's testimony, p. 5, fol. 14½.

Capt. Morris, the agent employed by the Boston underwriters on the ship, (plaintiffs' witness,) speaks of the ship's condition at the time as follows:

"I went on board the *Rachel* on the night of the 26th "September; I received the telegram that afternoon; *the* "*steam pumps and parties previously employed in saving* "*the property had left;* at that time the ship was heeled "over to port seven or eight streaks or more, the water "washing up to the hatches; at high tide the water rose "over the lee rail; the water in her at the hatches was "18 feet deep, and at the stern 19 feet; she lay hard and "fast in the hole she had made by rolling; the tide ebbed "and flowed in her."

Such is the testimony of two of plaintiffs' witnesses concurring as to the vessel's hopeless and lost condition: she was in fact an absolute total loss, as the expense of saving her far exceeded her value when saved.

The reason why Captain Merritt, who was first employed *for all concerned*, left with his men and saving apparatus on the 26th September, as above shown, is stated by him as follows:

"After the cargo was nearly out I came to New York to "see Crocker, Wood & Co. and the Secretary of the Board "of Underwriters in New York. My employers told "Crocker, Wood & Co. in presence of Captain Bangs that "I wanted oil casks to float the ship to bring her to New "York. That without them I could not save the ship. "They—one or the other—*said the ship was not worth the* "*expense.*"

"I left them and about noon of the 26th September sent

"my firemen down to the ship to take out our steam pumps, "cables &c."

Record, page 10, fol. 24½.

On cross-examination *Merritt* states this conversation was on 26th September, and after it he withdrew his steam pumps, materials, &c., except a cable which Mr. Crocker agreed to be responsible for and which was evidently lost to him.

Record fol. 25.

Crocker, Wood & Co, were the consignees of the ship, and Captain Bangs was sent on to New York by the owners of the ship, as stated by Mr. Ferdinand A. Crocker in his testimony.

This witness, Ferdinand A. Crocker, confirms Merritt's testimony as to this interview after the cargo had come up, but says that Merritt "wished to know if we wished him "to continue his efforts to get the ship off," stating that the steam pump, &c. would be very expensive and that they must be responsible for their value, to which he, Crocker, objected, and said he might either remove or leave it, and that he recollected no allusion to oil casks.

Crocker does not contradict Merritt's statement that they would authorize no further efforts, for the reason that the "ship was not worth the expense:" the only difference between them is that Merritt says it was put upon the ground of the expense of oil casks, while Crocker says it was the expense of steam pumps.

Captain Merritt, in consequence of the refusal of the representatives of the ship to authorize further expenses in saving her, abandoned all further efforts to save, withdrawing his men and apparatus about noon of the 26th September, and took no more part in them.

After this an agent was employed by the underwriters of the ship to save her. This agent was Captain Morris, who states his employment as follows:

"I was employed by the underwriters of the ship at "Boston. Col. Adams, President of the New England "Marine Insurance Company, was the one who communi- "cated with me. I was at New York when I was first "engaged. Col. Adams telegraphed me to go to the ship "and get her off if I could. I went on board the *Rachel*

"on the night of the 26th September. I received the "telegram that afternoon. The steam pump and parties "previously employed in saving the property had left."

Record, page 6, fol. 17.

The witness then states with the aid of oil casks, and in about six weeks, or the 11th November, he got the vessel off. The expense appears to have been nearly $7,000. She was valued on the Marine Railway at $5,000. Her "keel was out and gone."

Record, fol. 17.

It thus appears beyond dispute that the agent first employed—Merritt—acted with the assent and authority of all concerned, and for the benefit of all: That he rescued the cargo and sent it forward by lighter to New York, and after the cargo was discharged, upon making application to the ship's owners and their agents as to a continuance of the efforts to save the ship, they refused or declined to authorize him to do so, and he therefore abandoned all further efforts to save and withdrew his men and materials. After such withdrawal another agent was employed by those interested in the ship alone, who finally got her off.

The facts in this case are not disputed, and as shown above give a short and clear history of the efforts to save. So far from a "continuous series of measures," they show two distinct sets of measures, by different agents and by different employers.

There was not even a "continuous" action by the master and crew of the vessel.

Hamlin, the master, says:

"27 September, 1 A. M., Captain Morris, the Boston "Underwriters' agent, came on board and took charge of "the ship; at 9 A. M. *the crew came aft and refused to do duty.*"

Record, fol. 14½.

The 1 A. M. here spoken of was one o'clock at night.

Captain Morris, the Boston Underwriters' agent, says:

"At nine at night, when I first went on board, no work "was going on; the next day the crew refused to "work, they wanted to go to New York. I tried to make "an agreement with them, they refused. I went to New "York the next day, the 27th September, got a gang of

"men to supply their places; the men I hired worked until the ship got off."

Record, page 6, fol. 17½

Captain Morris, as we have seen by his own statement, was employed, not by the master of the ship, (Hamblin) but solely by the Boston underwriters, and as the master says he took charge of the ship when he came on board and thereafter directed all the measures to sail the ship—the crew refusing to do and doing no work after Morris took charge, and their place being supplied by a gang of men hired by Morris.

So far as the master and crew are concerned, therefore, there is nothing to support the idea of a continuous series of measures.

The expenses of saving the ship, incurred by Captain Morris, were..... $6,804 16

The ship was valued, after being raised, at.. 5,000

Recd., page 9, fo. 23.

Showing a sacrifice of nearly $2,000, about ⅔ more than the ship's value when saved.

In regard to the cargo, it appears that it was discharged into lighters and brought to New York, while Captain Merritt had charge of the efforts to save.

Merritt's testy., recd., p. 10, fo. 24½.

"Removed all the cargo we could get hold of, still the "vessel did not float. The cargo was sent up to the city "in lighters."

The cargo thus discharged into lighters by Captain Merritt and brought to New York, included all the cargo on board, except some remnants of damaged cargo and empty salt bags in the lower hold abaft the foremast, which were brought up in the ship to Hunter's Point. Captain Morris, who took charge after Merritt abandoned her, says, "I found nothing there to speak of" and *that he did not know there was any cargo on board until the ship was brought up to New York.*

Recd., page 6, fo. 16, 17.

The cargo discharged from the ship into lighters
at the West Bank sold for..... $24,600 00
The damaged cargo sold for..... 171 14
Empty salt bags sold for..... 127 20
Recd., page 9, fo. 23.

The damaged remnant of cargo in the ship, discovered on taking the wreck out of water, thus amounted to about $\frac{1}{144}$th part of the cargo brought up in lighters, or, including the salt bags, amounted to $\frac{1}{72}$d part of the whole.

Of the liquorice paste consigned to the defendants, (404 cases) all but twelve damaged cases were brought up in lighters.

Those brought up in the lighters sold for..... $11,747 28
The 12 cases found in the ship sold for..... 132 50
Recd., fo. 23, page 9.

These 12 damaged cases were delivered to the defendants and received by them through mistake, but the proceeds sales were returned to the consignees.

Crocker's cross examination.
Recd., p. 7, fo. 19.

These remnants were abandoned by the owners, and as shown above, were not known to be on board the ship by the person employed to save her.

A more condensed statement, without references to the case, would briefly present the facts as follows:

The ship was involuntarily stranded on the West Bank, in the lower bay of New York harbor, with her cargo on board. The cargo was insured in New York; the ship in Boston. The ship was consigned to a New York firm by the captain as agent for all concerned, as well the owners of the cargo in New York, as the absent owners of the ship in Boston. This firm paid all the bills. After the stranding of the ship, the agent for the New York underwriters on the cargo, *acting for all the interests*, went down with steam pump and wrecking apparatus, and discharged all of the cargo but a small remnant in the lower hold—not

known to be there—into lighters, and brought it to New York, its place of destination, where it was safely stored in the name of the consignees of the ship.

After the cargo was so discharged, the agent, Captain Merritt, who had been employed, applied to the consignees of the ship for authority to spend money for saving the ship, which was refused on the ground that "she was not worth the expense," being in a hopeless condition, "apparently breaking up and settling in the sand."

Thereupon, the agent, who had acted up to this time for all parties interested, ceased all further efforts to save the property, and withdrew his men and apparatus.

The underwriters on the ship in Boston, who had paid a total loss on her and to whom the ship had been abandoned, then employed their own agent, Captain Morris, who took charge of the vessel, and, after two months, succeeded in getting her off, and brought her to New York, *at an expense exceeding her value when saved of about* 1,900 *dollars.*

The remnant of the cargo in the ship after the agent of the Boston underwriters took charge was in the lower hold, under water, essentially damaged, and, with some empty salt bags—from which the salt had been washed out—was sold at auction for a trifling sum. This remnant, in the anguage of the agent last mentioned, was nothing to speak of, and was not known to him to be on board until the ship was brought up to New York, though he says he knew there were some casks on board, but did not know what they were.

The cargo discharged from the ship into lighters by the agent of the New York underwriters, sold for.....	$24,600 00
The damaged cargo brought up in the ship and discharged at Hunter's Point, including empty salt bags, sold for.....	298 34

not quite equal to one eighty-second part of the other.

Under these circumstances, the underwriters on the ship, which was totally lost and abandoned to them, and was in

fact an absolute total loss, since nearly two thousand dollars were sacrificed to get the wreck off and bring it to New York, call upon the insurers of cargo *safely stored at its place of destination before their efforts to save the ship commenced*, to contribute to the expenses incurred by them, and which were very much larger than the value of the vessel when saved.

The figures in this case illustrate the results of the doctrine maintained on the other side:

The cargo saved, before the attempts to save the ship began, and brought into contribution by the average statement, amounted to.....	$31,588 82
The ship, when saved, was valued at.....	5,000 00
	$36,588 82

The expenses in saving the ship alone were... $6,884 16

To this expense, under the claim of plaintiffs, the cargo would contribute six-sevenths, and the ship saved—$5,000, one-seventh. In other words, although those interested in the ship alone might sacrifice $1,884 64, nearly two-fifths more than her value when saved, in the efforts to save, they would still be gainers by the operation, as they would have $5,000 worth of material, at a cost to them of about one seventh of $6,884 16, or say $985.

It is clear that the equitable principle of General Average should not cover such a case as this, which would be, in effect, throwing open the door to any one of the interests concerned to gamble at the expense of the others.

Nor can it be justly said that those interested in the ship were justified by the state of things existing when they began their efforts to save, or were subjected to expenditures that could not be anticipated. At that time, the vessel lay hard and fast in the hole she had made; the tide ebbed and flowed in her; she was "apparently breaking up and settling in the sand;" and the consignee of the ship then said, as was in fact the case, "that she was not worth the expense."

With modern appliances, a "congeries of materials," as the Court in one case terms a vessel in such a situation,

may be saved if the cost of saving is not to be limited to the value of the thing to be saved.

Points.

I.—The General Rule will not be disputed, that expenditures are not to be brought into General Average, unless they are of an extraordinary character, and incurred for the *joint* benefit of ship and cargo.

As stated by Arnould—

"All which is ultimately saved out of the whole "adventure, *i. e.*, ship, freight, and cargo, contributes "to make good the general average loss, provided it "had been actually at risk at the time such loss was "incurred, but not otherwise; because if not at risk "at the time of the loss, it was not saved thereby."

2 Arnould on Ins., Perkins' ed., § 338.

Or, as stated by Phillips:—

"Goods, or any interest, are not liable to contribute "for the General Average or *expenses incurred subse-* "*quently to their ceasing to be at risk*,"

In this case the cargo had undoubtedly been stored in safety at its place of destination before the expenses to save the ship for which this action is brought, or any part of them, had been incurred.

Master's statement, page 6, fol. 15.
Merritt's testimony, page 10, fol. 24.

II.—The stranding was involuntary, and as a *cause* of loss or expense, did not give rise to a claim for contribution in general average.

III.—But although it is certain that the cargo, as a whole, was no longer at risk, and could not possibly be benefitted by the expenses to save the ship, and being safely stored at its place of destination, was absolutely separated from the ship and the adventure, it is claimed that these expenses are still the subject of contribution in general average under the particular circumstances of this case, and these must, therefore, be considered.

IV.—When Captain Morris, on the 28th September, 1859, took charge of the ship *Rachel*, at the request of, and as agent for, the Boston underwriters on the ship, the cargo had been discharged into lighters by other parties, and safely stored at its place of destination, and the freight earned, or was due thereon. No further service was to be rendered to the cargo by the carrier, nor had he any further connection with it, save his lien for freight and charges. It was no longer at risk, and the separation from the ship was complete and absolute.

All expenses thereafter incurred upon the ship were made with a view to its preservation alone, and could not possibly benefit the cargo, or affect the freight in any way.

Of the three interests, therefore, two—cargo and freight—were no longer at risk, but, on the contrary, were absolutely secured, and entirely independent of the ship, whatever might be its fate.

The ship itself was an absolute, total loss; the expenses of saving far exceeding its value when saved.

V.—If, then, the cargo was no longer at risk, and not connected with the voyage or adventure—which was ended, so far as the cargo was concerned—what prin-

ciple of general average can be invoked to bring it into contribution for the expenses of saving the ship?

Two or three points will be mainly relied upon by the plaintiffs' counsel

First.—That a portion of the cargo was still on board, and, therefore, the separation was not completely made between ship and cargo.

To this it seems a sufficient answer to say, that the portion remaining was a mere damaged remnant under water, abandoned as not worth saving, and amounting only in value, exclusive of empty salt bags to $\frac{1}{1\,4\,4}$th part of the whole. Such a remnant—"nothing to speak of" in the words of the agent employed to save the ship—comes plainly within the rule "*de minimis*," and cannot, in good sense or justice, be allowed to drag after it into contribution the cargo saved as an entirety. If such a remnant as this can be made use of to controvert the fact of the separation between ship and cargo, then no such separation is ever practically made, as it is in the highest degree improbable where a vessel takes the bottom and is strained and injured by striking and rolling so as to lose her keel, and open her seams that every particle of an assorted cargo shall be fully taken out of her. It is plainly refining too much to say, that the cargo is not separated from the ship, because it is found when she is taken out of the water, that some damaged remnants are mixed with the sand in her bottom, of the aggregate value of about $\frac{1}{1\,5\,0}$th part of the whole cargo saved and stored at its place of destination.

Second.—Another and more plausible ground is, that the efforts and expenditures to save the ship formed part of a continuous series of measures for the common benefit, and should, therefore, be justly brought into contribution with other expenditures incurred, and that all these expenses were defrayed by the parties to whom the master of the ship, as agent of

all concerned, had consigned the vessel in the absence of her owners.

Though it is true that the bills were paid by the consignees selected by the master, yet it appears distinctly in the case,

1st. That the New York Board of Underwriters interested in the cargo employed Captain Merritt to save the vessel and cargo, and that he did save the cargo and sent it in lighters to New York.

2d. That this agent, after the cargo was discharged, finding the ship did not then float, applied to the consignees of the ship to authorize further expenditures either by steam-pumps or oil-casks, to save the ship, which they objected to do, on the ground, as stated by Captain Merritt, that the ship was not worth the expense, and thereupon Merritt, the agent first employed, removed his apparatus and took no further part in the efforts to save.

3. That subsequent thereto a new agent, Capt. Morris, *was employed solely and directly by the underwriters on the ship at Boston*, to save the ship for their benefit, and that he did save her at an expense exceeding her value, when saved, of $1,884 16, the master and crew having previously abandoned the vessel and left her in the sole charge of the agent of the vessel's underwriters.

4. That no additional expense whatever appears to have been, or was in fact incurred in saving the ship, by reason of the remnant of cargo left in

her; the agent employed to save her stating that he "did not know any cargo that was on board," "until the ship was got off and brought up to "New York," though a few days after he got to the ship he discovered that there were casks and other things.

5. That the efforts of the agent of underwriters on the ship, were made with reference to the ship only, and not with the view of saving the remnant of damaged cargo, as the agent himself says he did not know at first there was any cargo on board, though he afterwards discovered some casks and other things without knowing what they were.

Morris' testimony, fol. 15–16, 24, Case.

6. These uncontroverted facts show, that so far from there being a "continuous series of measures" to save, there were two distinct sets of efforts, by different parties, and different interests; the first being for the benefit of all; the second for one interest alone, undertaken when it appeared to be, and was, in fact, a desperate enterprise, leading to a waste of money.

VI.—Nor were these efforts made with a view to save the "*adventure*," according to the distinction taken in some of the later cases, inasmuch as the voyage or adventure was terminated absolutely as to the cargo, by its safe arrival, and substantially as to the ship, which was stranded in the lower bay of the port of destination.

Nelson *vs.* Belmont, 7 Smith's Rep., p. 36.

In this case the decision was placed upon the ground that the cargo separated from the ship was liable to be taken on board again for the prosecution of the voyage, and the separation was, therefore, only temporary. Here it was absolute and final.

VII.—No adjudged case has yet carried the idea as to a "continuous series of measures" to the extreme point presented by the facts in this case.

Bevens *vs.* Bank of U. S., 4 Whart. R., 301.

In this case this point was carried to its furthest extent, yet in this the cargo, with the exception of the specie, was not separated from the ship, but was carried forward after being re-shipped to its place of destination. This decision has been much questioned by the highest authorities.

See Nelson *vs.* Belmont, cited ante, and cases there cited.

IX—As the vessel, after the cargo was taken out, did not float, and was in fact a total loss—the expense of floating her exceeding her value when raised—it is clear under the authorities that these expenses cannot be brought into contribution in general average.

Stevens & Benecke, Phillips Ed., pp. 139, 140.

Marshall *vs.* Garner, 6 Barb., 392.

2 Phillips Ins., 3d ed., p. 117.

X.—The stranding of the ship occurred in entering her port of destination. In such cases expenses incurred in raising the ship are not general average charges.

2d Arnould, 917.

Stevens on Average, 22.

XI.—Contributions in general average rest upon the equitable principle, that sacrifices or expenses by one of several interests at risk, for the common benefit shall be *apportioned* among the whole.

It has been perhaps in some respects too much extended from its equitable character, and from the consideration that it divides among several interests what would otherwise fall upon one: still all the apparent exceptions can be traced to the equitable foundation of the rule; and each case must depend upon the proper application of the principle to the particular facts.

To determine whether there was a "continuous series of measures" in this case, embracing the time and expenses incurred to float the ship, the Court—following the law—will deal with the substantial facts.

It appears plainly in this case that the vessel abandoned as a total loss to the underwriters of that interest on the ship being sunk, was raised by them as a gambling adventure, in which the cost of saving far exceeded the value of what was saved, and was a sacrifice of money, yet as to them it resulted in a saving, if the cargo could be made to contribute.

This temptation would be offered in every case to raise or rescue a vessel at almost any cost if the expense could be saddled upon a valuable cargo already stored in safety.

The learned Judge, before whom this cause was tried characterized it as "perhaps a close case;" and it is due to the importance of the question involved, to present to the Court a statement of the cases here and in England, directly bearing upon this subject.

The case of Bedford Ins. Co. *vs.* Parker; 2 Pickering, 1, was tried in 1823, and the opinion was delivered by Chief Justice Parker. In that case, the ship was on her voyage from a foreign port to New Bedford and struck on a reef outside the harbor, about nine miles from the town. Shortly after she struck, the defendants, who were owners of *ship and cargo* offered to abandon her to the plaintiffs, who were the underwriters. They refused to accept, but determined to save the ship if they could, the defendants agreeing that nothing done by the plaintiff with that object should prejudice them on the question of the defendants' right to abandon. Men were sent to the vessel by the plaintiffs to save what they could of the sails and rigging, and some of the iron of which the cargo consisted was taken out by them and carried to New Bedford. A large quantity of iron was saved, also, by men employed at the expense of the defendants. Considerable quantities of iron were taken out of the hold; and some of the men employed by the plaintiffs, aided by pumping and otherwise to save the cargo; but during the time the defendants had men on board who were employed by them at their expense in getting out the iron. Forty tons of iron were taken from the ship and were brought to New Bedford by a sloop in the employment of the plaintiffs, but the defendants had vessels there, ready to have taken it. The labor and difficulty in saving it was in getting it from the ship's hold, and this was done by the defendants' men. After this, the Directors of the company authorised two of their number to offer $2,000 as a compensation to any one who would undertake to get the ship off, the contractor to be paid nothing unless he should succeed, and with the consent of Parker, one of

the defendants, the agents were to offer $600, provided the iron should be all taken out, and the vessel should not be removed ; and so in a certain proportion for so much iron as should be taken out.

The agents contracted with one Delano, engaging to pay him $2,600 if the vessel and the whole cargo should be made secure, but no express stipulation was made relative to the iron separately. It was understood, however, that the contractors were to be paid in proportion to what might be saved, to the extent of $600. They got the vessel off and brought her safely into the harbor, having about 155 tons of iron still on board. The ship was also repaired by the defendants, the parties to the policy having agreed that the insurer should pay $1,750 for repairs necessary upon the ship.

It was also in evidence, that when the plaintiffs settled their accounts with the laborers, who also assisted in saving the iron, they refused to pay those men who were engaged by the defendants. These parties of men acted separately, though sometimes assisting each other.

The question was what part of the cargo, if any, should contribute to the expenses of raising the ship, and the Court held that only that part of the cargo that was in her when she was raised should contribute to the expenses of raising her.

This case is altogether parallel with that now before the Court, except that in the case in Massachusetts, the ship and cargo were owned by the same persons—who separated to some extent from the underwriters, in their efforts to save their several interests ;—while in this case the owners of the cargo and ship being different persons, acted in concert down to the time that the underwriters on the ship took sole possession of her.

The cases are alike in another point. In the New Bedford case, the bills for saving the cargo were paid by the owners of the cargo and ship. In this case—Captain Merrit, although he was primarily employed by the cargo interest, and had the right to look to them for payment, was paid by the consignees of the ship upon account of all who might be liable.

On page 10, fol. 24, Captain Merritt speaks of his "employer's", who they were; and on page 5, fol. 13, Captain Hamblin says that "at 9 A. M., on the 22d, the "*New York underwriters' agent, Captain Merrit*, came on "board, * * * *—getting ready to rig the steam pump "and discharge cargo." He also says, on September 26th, "the steam pumps were taken down and brought away, "*having finished discharging cargo*, fol. 14. * * * * * * * "27th September, at 1 A. M., Captain Morris, *the Boston* "*underwriters' agent*, came on board and took charge of "the ship."

As Captain Morris in this case alone represented the underwriters on the ship, and first appears upon the scene after the cargo had been discharged, and as the plaintiffs in the New Bedford case represented precisely the same interest that Captain Morris did in this case, it will be seen that one of the reasons given by Chief Justice Parker, for holding that the cargo thus saved should not go into general average—(to wit: that the cost of saving it was at the expense of those interested in it,) applies with greater force to this case, inasmuch as the Boston underwriters did not commence operations upon her until *after* the cargo was saved, and therefore could not have been at any part of the expense of such saving.

In his opinion, the learned Chief Justice says: "This "case presents a question which we do not find to have "been decided in this State, in New York, or in England, "and what is quite remarkable, on inquiry among the un- "derwriters of Boston, it appears that it is considered a "new question by them." Again, he says: "When a vessel "is accidentally stranded in the course of her voyage, and "by labor and expense is set afloat and completes her voy- "age *with her cargo on board*, the expense bestowed for "this object, as it produces benefit to all, so it shall be a "charge to all according to the rule of apportioning gene- ral average."

Thus laying down the general proposition, he then makes the application to the case before him as follows: "We "think the plaintiffs' claims for contribution on that part "of the cargo which *had been taken from the vessel be-*

"*fore the contract was made under which the vessel was* "*raised and brought into the harbor*, as untenable as the "defendants' position, that the part which remained on "board should not be held to contribute. * * * The "principle of contribution is, that everything which is "saved by the common expense and labor shall pay that "expense in proportion to its value. It cannot be said that "the iron taken from the vessel by the owners was saved "by means of the successful execution of the contract."

This case is cited by the defendants in error, but if the rule laid down in it is the correct one, it is directly against him, for in this case as in that the contract was made under which the vessel was raised and brought to the dock after the cargo had been taken from the vessel, nor can it be said that the cargo taken from the vessel by the owners was saved by means of the successful exertions of Captain Morris.

The next case is that of Bevan *vs.* The Bank of the United States, 4 Wharton, 301. The plaintiffs were the owners of the ship *Edward Bonaffe*, which arrived in Delaware Bay in December, 1831, from New Orleans for Philadelphia, and after encountering various difficulties became stranded and ice bound near Reedy Island, in a situation of imminent peril. It was necessary to remove her cargo as in case of wreck. Among the first articles landed was a sum of specie belonging to the defendants. It was received on the ice in sleds, and immediately conveyed to the shore, on the morning of the 16th of December, 1831. It was then sent to Philadelphia, and on the following day delivered to the defendants. Eight weeks after, the vessel arrived in Philadelphia with the remainder of her cargo, which had been in whole or in part discharged into lighters and afterwards re-shipped.

During the period of eight weeks a large number of additional charges had been incurred for the safety of the vessel *and the remainder of the cargo.*

In this case the question was, whether the expenses incurred in getting the ship into port after the specie had been sent forward should be brought into general average, including the specie, and it was held that they should.

This decision has been much questioned, as will be presently shown, but the Court will observe such a distinction in the facts of the two cases as to make it altogether inapplicable to this. The only ground upon which a plausible argument can be made to sustain it is, that the same series of measures taken by the captain to save his ship and cargo continued to be taken by him up to the time that his ship and cargo arrived in Philadelphia. In the case before the Court no such fact exists, for here the ship was saved by new and independent efforts contracted for and commenced after the cargo had been saved, and all further efforts to save the ship abandoned by her consignees, such new efforts being made solely by the underwriters on the ship. Captain Morris was employed solely by the underwriters on the ship.

See McAdams' letter, fol. 25.

Captain Hamblin (folio 14) says: "27th September, at 1 "P. M., Captain Morris, *the Boston underwriters' agent*, "came on board and took charge of the ship. At 9 A. M. "the crew came aft and refused to do duty.

This is followed by a remark which may have led to some misapprehension of facts in the Court below. It is as follows: "*Day consumed in saving cargo and materials.*" (Folio 14.)

So far as respects the cargo, this is an error. Captain Hamblin himself, on the fifth line of the record preceding, had said that the steam pumps were taken away on the 26th, "*having finished discharging cargo;*" and Captain Morris (folio 15) testified that, when he first went to the ship, he did not know there was any cargo on board; and again, at folio 16, states as follows: "*No cargo was dis-*"*charged from her into lighters while I worked at her.*" Taking the two statements together, it is clear that after Captain Merritt left the ship and removed the steam pumps, (which was on the 26th,) no cargo was removed or attempted to be removed from her. Morris himself says, at folio 16: I was employed by *the underwriters on the*

ship at Boston. Colonel Adams, President of the New England Marine Company, was the one who communicated with me. * * * * * * He telegraphed to me to go to the ship and get her off, if I could. I went on board on the night of the 26th of September. "The steam pump "and parties previously employed in saving the property "had left." * * * * * * "At 9 o'clock at night, "when I first went on board, no work was going on. The "next day the crew refused to work." * * * * * * "I tried to make an agreement with them; they refused; "I went to New York the next day and got a gang of men "to supply their places."

It is not possible to present a case showing a more entire change of administration and employment than this testimony presents. Captain Hamblin had first exhausted all his efforts, with two steamtugs, to work the ship off the shoal. Captain Merritt was next employed by the cargo interest, with the approbationof the consignees of the ship. He, with the captain and crew of the ship, relieved her of her cargo and materials, without getting her afloat. Merritt then reported to the consignees of the ship, in presence of Capt. Bangs, the agent of the owners in Boston, her condition, and what would be required to float her. This was declined, on account of the expense, and, therefore, all measures by these parties ceased. The steam pumps were removed from her, and the ship laid with the tide ebbing and flowing into her, abandoned for twenty-four hours. Then it was that new measures were adopted by new parties, having no interest in the cargo or freight, to whom she was abandoned as a total loss. These measures were continued for six weeks, during which time they expended the sum of $6,884 to raise a hull which, when saved, was valued by experts at $5,000, and in which was found some remnants of cargo, amounting to $298. This is the case before the Court; while, in the case of Bevan, there was no abandonment by any one; the captain and his crew remained on board; a large portion of the cargo was taken out, and all of it was afterwards returned to the ship, ex-

cept the specie in question, when the vessel proceeded on her voyage.

Mr. Phillips, in his work on Insurance, vol. 2, section 1,407, questions this decision, and shows very satisfactorily that the passage in Benecke, the authority on which the case of Bevan mainly relies, is not analogous to the case in question, and that the case of the specie "does not," to use his language, "seem to be distinguishable from that of a "part of the cargo being landed after arrival at the port "of destination, and a subsequent general average loss on "the ship and remainder of the cargo still on board, to "which the part delivered would unquestionably not be "liable to contribute the remainder of the cargo, in the "case in question, not having been delivered to the con- "signees, but landed and reloaded on the ship being afloat "again, continued to be within the ordinary category of "contributory interest."

Judge Parsons, in his valuable treatise on Maritime Law, vol. 1, page 326, note edition of 1859, after referring to the several decisions on this question, uses the expression: "Mr. Phillips doubts the correctness of the decision first "mentioned, (Bevan *agst.* The Bank of the United States,) "and in this conflict of authorities it is impossible to deter- "mine with accuracy what the law is."

The Court of Appeals of the State of New York, in the case of Nelson *v.* Belmont, 21, N. Y. 36, discusses the opinion in the case of Bevan, and doubts that it can be sustained upon either of the grounds upon which it is put.

For the purposes of this case, however, it is sufficient to say, that in its important facts it is so essentially different, that it is not an authority to sustain the position of the defendant in error here. The next case is that of Sparks *vs.* Kitridge, decided in 1846, in the United States District Court of Massachusetts, 9th Law Reporter, 318. The vessel was bound for Boston and accidently stranded near Edgartown, the cargo was taken out and put in a place of safety, and subsequently the vessel was got off and repaired, the cargo taken on board and delivered in Boston. The claim was to charge in general average the expenses incurred in getting the vessel off after the cargo was landed,

Judge Sprague, in his opinion says: "when the expenses "were incurred the cargo was in safety, and it could not "be said that the cargo was saved or relieved from peril "by the expenses of getting the vessel off. The only "ground on which the claim could be made would be that "they were incurred for the furtherance of the voyage in "order for its completion. If this was so, then the expenses "of repairs should also be charged in general average, for "they stand on the same ground." Cargo held not liable. Although this is one of the conflicting authorities spoken of by Judge Parsons, other Judges who have held differently have encountered the difficulty of separating the repairs of the ship from the expenses of putting her where she could be repaired, without finding a satisfactory solution to it.

The next case is that of Nelson *vs.* Belmont, 21st, New York, R., page 36.

In that case the *Galena* sailed from New Orleans for Havre with a cargo of cotton and $30,853 in specie belonging to the defendant. On July 23, 1853, the vessel was struck by lightning in the Gulf stream, and was found to be on fire in the hold. After attempting to extinguish it, a Danish vessel was signalized, and the passengers and their baggage transferred to her. On the following day an arrangement was made with the Danish captain, by which he was to take the specie on board his vessel and accompany the *Galena* to Charleston.

This was done because he had the passengers on board, and as a protection to the crew in case they had to leave the *Galena*. The specie was transferred, because if the fire broke out it might be too late to remove it from the *Galena*. Both vessels reached Charleston on the 26th. The fire engines of the city poured water into the *Galena* till she filled and sank to the upper deck. The cotton absorbed a good deal of water, very little of it having been previously injured, and the captain determined to abandon the voyage. He sold the cargo there and remitted the proceeds. While in the harbor and before reaching the wharf, he got the specie from the Danish vessel and deposited it in the bank. The question was whether the specie was liable to contri-

bute in general average to the amount paid for the services of the Danish brig, the expenses at Charleston of sinking and raising the vessel, the repairs, and damage to the cotton by water, &c.

In delivering the opinion of the Court, after stating the case, in and referring to the decision in 2d Pickering Judge Selden goes on to say (p. 42): "This decision, which "has been uniformly approved, appears to me to be in strict "accordance with the principles upon which the doctrine "of general average rests. My conclusion, therefore, is, "notwithstanding the case of Bean *vs.* U. S. Bank, that "if the owner of any portion of the cargo even after a peril "has occurred and after a series of measures to avert it "has commenced, can succeed in so separating his own "property from the rest that it is no longer in any case "at risk, he cannot be held liable to contribute to the ex-"penses subsequently incurred."

After some remarks upon the term "at risk," he goes on to indicate where the line of distinction lies: "If the voy-"age is not abandoned, and the property, though separated "from the rest and removed from the ship, is *still liable to* "*be taken again on board for the purpose of being carried* "*to its destined port*, the relations of the several owners are "in no respect changed."

Referring to the case now before the Court, it will be seen that this cargo was taken out by the underwriter's agent and sent to the Atlantic Dock, in Brooklyn, from whence it was received by the owners by orders from the consignees after obtaining a permit from the Custom House, in the same manner as if the ship had arrived at the Atlantic Dock, in the port of New York. So that the two points taken by the Court, in the case of Nelson *vs.* Belmont, necessary to bring a separated cargo within the rules of general average, viz., that it is still *under the control of the master* and *liable to be taken again on board for the purpose of being carried to its destined port*, do not exist in the case at bar. The cargo had reached its destined port and had passed out of the control of the master into the hands of the consignees before the expenses in controversy in this suit had been incurred.

Referring again to the opinion in Nelson *vs.* Belmont, the Court say: "The result of the principles, when applied

"to the present case, are plain. It turns entirely upon the "nature and object of the separation of the specie from the "ship *Galena*, and from the residue of the cargo when it "was placed on board of the Danish brig. I entertain "no doubt that such a severance as would have exempted "it *from all liability to contribute to the subsequent* "*expenses might have been effected by the master of the ves-* "*sel, in the same manner as by the owner himself, had he* "*been present. The master is the agent and representative* "*of each of the owners* in respect to their several shares of "the property under his charge, and has the same right "which the owners themselves would have to take meas-"ures for its preservation. If, therefore, the master of the "*Galena* had put the specie on board the brig, not in any "event to be returned to him, but to be taken by the brig "to its own port of destination, and the latter had then "been suffered to pursue its course, the specie would "not have been subject to contribution for any subsequent "expenditures to save the *Galena*. And notwithstanding "the brig was employed to attend the *Galena* to Charles-"ton, if it had been distinctly understood between the two "commanders that the specie was committed entirely to "the custody of the Danish captain, and was in no event "to be returned to the care of the captain of the *Galena*, "it would then also have been exempt.

This is precisely in point to sustain the plaintiff in error. Even if it could be said that the cargo was discharged from the ship by the captain himself, instead of Captain Merritt, in behalf of the owners, "not in any event" (to quote the words of the opinion), "to be returned to him, but to be "taken to its own port of destination," the cargo would clearly not have been subject to contribution for any subsequent expenditures to save the *Rachel*.

This also answers the supposed distinction between this case and the case in 2d Pickering, for it establishes that a separation by the master, for the purpose of delivery at the port of destination, is as effectual for terminating the joint adventure, as if it were delivered to the owners at the side of the stranded ship, the captain being the agent of the owners for the purpose. The plaintiff in the case of Belmont was held to be entitled to a recovery

because " the specie was put on board the brig, because it " was safer there, as in case the fire broke out, it might be " too late to transfer it to the ship." The brig was to " accompany the *Galena* to Charleston, and there is nothing " from which it can be inferred that it was the intention " of the captain of the latter to relinquish his control of the " specie. The fact that he reclaimed it, and took it from " the brig as soon as he arrived at Charleston, tends strongly " to the opposite inference. It never ceased, therefore, up to " that time to constitute a part of the cargo of the *Galena*, " and if the fire had been effectually extinguished, and the " voyage resumed, it must, of course, have been again " taken on board and carried forward by her."

All the Judges of the Court of Appeals, of New York, including Judge Denio, concurred in this opinion, except Comstock and Clerke, the former maintaining, in a very able opinion that the specie was not liable to contribution for the losses and expenditures which were incurred in saving the ship and cargo, after the specie was landed in Charleston.

In England the first case affecting the question is reported in Shower's Parliamentary Cases, page 18. There a ship laden with silk and oils from Messina to London, was chased to Malaga by the French fleet. The factor of the *owners of the ship* sent a lighter to save what he could of the ship's cargo, and because the silks were of the greatest value, they were put on board of a lighter, with a small portion of the oil, and carried on shore. At night the French left the port, when the master ceased to land any more cargo. Some few days after the fleet again appeared, and the French got the ship and the remaning cargo. The silks were afterwards put on board another ship, and delivered to their owners in London. The action was brought by the owners of the ship and oils against the owners of the silks, to have contribution for their loss, but the bill was dismissed by the Chancellor, which was affirmed upon appeal by the House of Lords. This was in 1693. In the case of Job *vs.* Langton, 6 Ellis and Blackburne, 779, the ship with a cargo from Liverpool, ran on shore accidentally, on the coast of Ireland. In order to get her off, it became necessary to discharge the whole of her cargo, which was taken out and placed in store in

Dublin. The ship was got off by digging a channel and employing a steamtug. The cargo was shipped in another vessel and forwarded to its destination; but for the purposes of the case, it was to be considered as having been carried on by the original ship, after she had been repaired. The question was, were the expenses incurred after the cargo was in safety, in getting off the ship and towing her to Liverpool for repairs, chargeable in general average, or to the ship alone,? Lord Campbell (all the Court agreeing with him) held they were chargeable to the ship alone.

Connecting this case with that of Moran *vs.* Jones, 7th. E. & B., subsequently decided in the same Court, it will be seen that it was put upon the ground, that the expenses claimed were incurred under an agreement made subsequently to the saving of the cargo, and were not part of a continuous series of measures for the safety of the cargo and ship jointly. The case at bar is precisely like it. No objection is made by the plaintiff in error to any part of the expenses incurred in removing the cargo and materials, down to the time that the cargo was safely landed and the ship practically abandoned by her consignees. The objection goes to the expenses incurred under Captain Merritt's administration, after he was employed by the underwriters on the ship, twenty-four hours after the abandonment.

In the case of Job *vs.* Langton another fact appeared, to which the notice of the Court is requested. The cargo in that case was of coal, and when it was discharged, a very small part of it, to wit, fifty tons, were left on board the ship to "stiffen her." In this case a small remnant of cargo, bearing the proportion of $\frac{1}{144}$th part of the whole, was also left on board, to be removed because it could not be got at, although, when Captain Morris went on board, he supposed there was no cargo in the ship, and acted upon that idea.

But even assuming, for the purpose of the argument, that this small remnant of cargo in the ship performed the office of connecting that which had been safely landed with it, and that, in judgment of law, no portion of the cargo had been separated from the adventure at the time the underwriters on the ship took charge or her, and that, under ordinary circumstances, it would all come into general

average, still the rule would not apply in this case, because the expenses incurred in saving the ship were more than her value after she was saved, and greatly beyond a constructive or technical total loss. In such a case, under no circumstances, do the expenses of saving the ship become general average.

A. There is no reported case to be found which favors any such idea, and all the authorities are against it.

In the case in 2d Pickering, where the average was only charged upon that part of the cargo saved with the ship, the whole contract for saving the ship was $2,000. Her repairs were $1,750. So that the cost of raising her bore but a small proportion to her value when raised—much less than a constructive total loss. So in the case in 4th Wharton, the expense of saving ship and cargo bore an equally small proportion to the value of ship and cargo when saved. The same remark applies to the case in 7 Ellis and Blackburn, the whole sum in dispute being £643.

Mr. Phillips, in his edition of Benecke's Average, in a note on page 367, says :

"Experienced despacheurs state the rule on this sub-"ject to be, that expenses are general average as long "as the cargo remains on board. Or if the stranded ship "be got off *without being a constructive or technical total* "*loss*, in Baltimore, we deem the expenses of getting her "off to be general average."

According to this rule, if a stranded cargo be landed, and the expenses of getting off the ship be more than a constructive or technical total loss, and the ship afterwards take on the goods, those expenses would not be paid in general average. Again :

The rule would not apply in such a case as this, because it would subvert the principles of general equity upon which the rule of general average is founded, and be a temptation to rescue property under any circumstances, and at any cost, by bringing the expense of saving it into general average.

No better illustration can be given than in this case, where parties having an interest in the ship alone, by spending $6,884, and saving a thing worth $5,000, become

entitled to the thing saved at a cost of $985—the balance being borne by those who had nothing at risk.

The case of Moran *vs.* Jones, 7 E. & B., 523, was one of stranding, in which the total amount of expenses for saving ship and cargo was £6,335. As one of the measures for raising the ship, the cargo was put into lighers, landed, and afterwards put on the ship before she proceeded on her voyage. The expense incurred after the cargo was discharged, and before re-loading, was £643. These expenses were in controversy.

Lord Campbell, in giving the opinion, says: "The "goods had been taken from the ship and put on board a "lighter before these expenses were incurred, and if this "had been a separate operation, by which they were "intended to be saved for the benefit of the owner "of the goods, we should have thought, as in Job *ag.t* "Langton, that the goods were not liable to contribute "to the expenses subsequently incurred. * * * * * "In Job *vs.* Langton, we considered that the goods had "been saved by a distinct and completed operation, and "that afterwards a new operation began, which could not "be properly distinguished from the repairs done to the "ship to enable her to pursue the voyage. The steamtug "did not work at the ship, and does not appear to have "been engaged until after the cargo was landed, and the "coals and ballast taken out of her. In giving judgment, "the Court there observed the employment of the steamtug, "and the cutting of the channel by which the ship was "rescued cannot, as was contended for, *be part of the same "operation as the unloading of the cargo.*" Thus the Court, in the case of Moran *agst.* Jones, approved of the principles on which Job *agt.* Langton was decided, and upon a state of facts altogether like those in the case at bar, so far as the continuity of operations is concerned.

In both cases the cargoes had been safely landed, before the new measures for saving the ship were taken. In one case the steamtug did not begin work at the ship, and did not appear to have been engaged until after the cargo was landed, and in the other the employee of the cargo interest had discharged his cargo not only in safety, but in its port of destination, and twenty-four hours had elapsed before a new in-

terest took possession of the ship and commenced a new series of measures for her recovery.

There is another remark in that opinion particularly applicable to the case at bar. Lord Campbell says, respecting the *Snowdon*, "The owner of the ship, after the cargo "was discharged, appears to have done nothing except in "the discharge of his ordinary duty as owner, and for the "exclusive benefit of the ship."

It was claimed by the defendant in error in the Court below, that the remnant of cargo which was found in the ship when she was put in the dry-dock, connected with it all the cargo that had been landed, and thereby brought the whole into general average; because it could not be said, with literal truth, that the efforts in raising the ship, after Captain Morris took charge of her, were exclusively for the benefit of the ship.

The case just cited of Job against Langton, is an answer to that proposition. In that case fifty tons of coal were left intentionally on board of the ship, and yet, for all the purposes of the case, the whole cargo was treated as having been discharged. In this case all was discharged that could be reached, and the parties who had commenced the new operation of saving the ship, acted upon the belief that all the cargo had been discharged.

It is not denied but that this remnant of cargo thus unexpectedly saved, should bear its proportion of the expenses of the saving, but it is strenuously contended that it shall not perform the office of a sort of umbilical cord, to connect it with the main body of the cargo, and thus draw it into contribution in general average.

Independent of these adjudications, the writers upon maritime law lay down the rule to be in accordance with the theory of the plaintiff in error in this case. Mr. Phillips, § 812 of his work on Insurance, Vol. 2, says:

"The expenses of discharging the cargo, to get a vessel "afloat that has been accidentaly stranded, and that of "reloading the cargo and the other expenses requisite "to enable the vessel to proceed on her voyage, except "those of making repairs, are in pratic brought into gen-"eral average, where the vessel after being got off pro-"ceeds with the same cargo, but in case the lightening of

" the vessel does not make her float and other means are " necessarily resorted to for this purpose, such as buoying " the vessel with casks or making a channel, the ex- " penses incurred on the vessel after the cargo is landed, " are incurred for the benefit of the vessel that she may be " able to earn freight, and are not any more properly the " subject of general contribution than the repairs of the " vessel. Accordingly, Mr. Jacobson says, that the clearing " away, if the ship cannot be brought up by mere lighten- " ing and raising are particular average."

Another quotation from Phillips and one from Arnould have already been given under first point.

Arnould further states, on page 915, Vol. 2. (original paging) " A stranded vessel is in most cases in danger of " being lost unless speedy steps are taken for her preserva- " tion, either by unloading the cargo to lighten her, or " by endeavoring to float her by means of buoys, with the " cargo in her. The remuneration, which the shipowner " is obliged to pay for the service thus rendered gives a " claim to general average contribution, provided such ser- " vices shall appear to have been incurred for the joint be- " nefit of ship and cargo, which will be the case if ship " and cargo are both exposed to a common danger and both " saved from it by the exertions employed for their rescue. " If, however, the safety of the ship be hopeless, or that of " the cargo no longer endangered, no such claim can be " sustained."

On page 917, Arnould, speaking of the practical rules that have been derived from these principles, lays down as the second that " these expenses are never general average " when the stranding occurs *in entering the port of desti-* " *nation*, for in such cases it is considered that the cargo " can never really be in jeopardy," and quotes Stevens on Average, p. 22.

If this rule is correct, it applies to the case now before the Court, indepedent of all other considerations. The ship was stranded in entering the port of New York.

Benecke on Average mentions the case of a vessel from London to Hamburg which was driven by a high tide ashore very near the latter port. The cargo was unladen, not with a view to set the vessel afloat, but for delivery to

the consignees, and the ship was dug out. The vessel, in that case, could not be called to contribute to the unloading although she was accidentally benefitted by it, and there was no ground for contribution by the owners of the cargo to the expenses of digging her out, because that was done for her own benefit, it being of no consequence to the consignees whether she floated or not."

It is therefore respectfully submitted that the average adjustment should be re-stated. The expenses and sacrifices in the first day with steam tugs to rescue ship and cargo carried into general average, while the expenses of saving cargo and ship should be charged to the separate interests benefitted thereby.

ALEX. HAMILTON, Jr.
SAML. E. LYON,
Of Counsel.

SUPREME COURT.

UNITED STATES.

THATCHER, and others,
Def'ts in Error,

against

McANDREW & WANN,
Pl'ffs in Error.

No. 173, *Dec.*, 1864.

Statement on part of Defendants in Error.

1. The plaintiffs are owners of the ship *Rachel*, which sailed in July, 1859, from Liverpool, with a general cargo, bound to New York; in which cargo was included a consignment of liquorice paste, consigned to the defendants (fol. 11), of the value of £1,857 1s. 5d. (Fol. 21.)

The vessel, on the 21st September, got inside of Sandy Hook, but on that day, in coming up the bay, in a heavy gale, she struck on the West Bank, and became fast. (Fol. 12.)

2. Endeavors were made to get the ship, with her cargo, off, by steamers and sailing apparatus, from New York, but the vessel rolled, and bedded herself in the sand, and the water at last rose in her, as the tide rose and fell. (Fols. 13 to 18.)

Finding themselves unable to drag the vessel off the bank, or to free her of water, the cargo, so far as it could be got at, was discharged into lighters. (Fol. 14.) This, with endeavors to free the vessel, continued until the 27th September, when the crew left her (fol. 24); but the master and the agents of the underwriters continued until the 30th September, when the master finally left the ship. (Fol. 15.) Capt. Morris, agent of the underwriters, who had come on board on the 27th, continued the operations on the ship, putting in oil-casks to float her, if possible, and heaving on her anchors, until the 11th November, when they succeeded in getting the ship off. (Fol. 16.) She was towed up to the city of New York, a small part of her cargo remaining on board, was there delivered, and the ship put on the railway at Brooklyn. (Fol. 17)

4. After Captain Morris was employed by the underwriters, no further cargo was discharged into lighters; but he proceeded continuously, and without intermission, to save the vessel and her contents, and at no time gave up the endeavor as desperate. (Fol. 16).

5. The cargo delivered from the ship into lighters was brought to New York, and placed, by the master's consignment of the vessel, into the hands of Crocker, Wood & Co, agents of the ship; and the cargo remaining in the ship when she reached New York, was taken by them in the same way. Crocker, Wood & Co., as agents of the ship, gave to the consignees orders for their goods, on their signing a general average bond, under which they received them. (Crocker, fol. 18).

The chief part of the defendants' consignment was brought up to the city in lighters; a part, twelve cases, remained in the ship; these were delivered from it and the railway. All the goods were alike received from the agents of the ship. There was also in the ship, when she got up to New York, besides the liquorice, some soda-ash much damaged, some salt-bags (out of which the contents were dissolved), and a small quantity of bar iron. (Fol. 18).

5. The whole expenses on the saving of vessel and cargo, were (adding the items on fol. 22). - - - - - -	$13,772 07
The expenses after Morris came on board were p. 23. -	6,884 76
The ship as saved (fol. 22), was valued at - - -	6,758 00
The cargo (including sales of damaged). - - - $24,600 and $298 34 (fol. 22.) - - - - - -	31,754 66
The freight earned was, (fol. 22) - - - - - -	978 06
The sales of the whole of the defendants' consignment of 354 and 54 cases of liquorice was, (fol. 23) - -	11,747 28
Of that delivered from the ship after she got off, deducting charges, (fol. 23). - - - - - - -	132 50
The contribution of their consignment to the whole expense was adjusted to be (fol. 23). - - - -	3,363 89

For which, with interest, the verdict was taken.

The freight was paid by the defendants, and is not in question.

BRIEF FOR THE DEFENDANTS IN ERROR.

First Point.—1. The ship and cargo, when stranded before her arrival in port, were jointly exposed to a common and imminent danger of loss.

2. The expenses of relieving the ship and cargo were a proper subject of joint and rateable contribution in general average, by vessel, cargo and freight.

3. That the stranding was involuntary, does not derogate from the right to the contribution.

4. The community of extraordinary peril, commenced with the stranding, and did not terminate until the arrival of the vessel and cargo at the place of safe delivery. The connection of vessel and cargo as to common service, did not end before.

Second.—1. The whole saving, with its attendant expenses, was one continuous unremitted operation, from its beginning until the ship, with the remnant of cargo reached the Marine Railway at New York.

2. The saving was a continuous operation in point of fact. Although taken in hand by those who were substitutes for the original master and crew, yet they represented the owners of the ship, and in the line of their duty as such.

3. The vessel and cargo continued in the joint possession of the owners of the ship and their agents, and the cargo was not received from them until the various parts of the cargo had all arrived and been delivered at the end of the voyage; and had been received on the orders of the owners' agents, and subject jointly to a claim of general average.

4. The consignment of defendants' was not received or saved by them, separately or severally, or through any separate act of their own. It also was protected by a right of contribution in case of loss, while proceeding in the saving vessels from the shoal to the place of delivery in the city of New York.

5. A part of the defendants' consignment remained in the ship to the last, and was received by them from the ship's agents, at the city of New York, and sold by the defendants. Had this

been of great value, it would not have been exempted from its contribution. But until actually delivered and sold, its value could not be ascertained. And moreover its value could not vary the principle of the liability, but merely the amount of its assessment.

6. The defendants stand in the same condition as if all their consignment had been retained by the ship's agents, until received under a common bond of united responsibility.

Third.—1. It is contrary to the principle of general average, to relieve any of the parts of the common adventure from its rateable share of contribution, by reason of its delivery being made successively when made by the endeavors commenced and continued in common.

2. The labor and expenditure of rescuing the part of an adventure first relieved, is chargeable on the residue of the cargo, and on the ship; because the latter are thereby relieved of part of the danger. The goods taken into lighters on the relieving of the ship, are still at the risk of the ship and cargo, which their unlading or jettison first relieves.

But as the ship and residue of the cargo are thus chargeable with a burden, they are equally entitled to relief and contributions from the cargo whose safety is promoted by it.

3. To exempt from general contribution the parts of adventure, as they successively reach their safe destination, would render a new statement necessary upon each part of cargo delivered, and upon each remaining residue, which would be impracticable as well as contrary to the principle of general or common contribution.

4. Supposing the value of the ship and the freight in peril large, and that of the cargo small, if the cargo is relieved by common expenditures falling largely on the ship, the ship thus contributes largely for the saving of the cargo; the equity is the same, if the values are reversed and the cargo is made to bear more, according to its just proportion.

Fourth.—In answer to the several points embraced in the requests to charge the jury, (fol. 27 to 30), we submit:

1. If indeed a part of the cargo had been stored in safety at its destination, before the expenses to save the ship were incurred; still this would not exempt from contribution the part of the cargo which had been relieved from peril by the continuous and common efforts. In the nature of the case the saving will be successive although the common efforts be continuous.

2. That the stranding was involuntary, does not prevent a con-

tribution; expenses may be involuntary and necessary, besides the losses by voluntary jettison.

3. That the expenses were incurred after the master quit the ship, and that they were incurred with a view to the preservation of the ship alone, is no answer to the claim; for salvage efforts were made by the agents of the ship in the line of the ship-owners duty. There was cargo still on board to be saved with ship. And the ship herself, liable to contribute for the saving of the cargo, was to be saved in aid of the general fund and common adventure.

4. The adventure as to the voyage was not ended during the proceedings to save the ship and what remained of cargo. The voyage was not ended until the ship was relieved and reached her port; and the cargo was not severed from the ship otherwise, than as subject to its just contribution and remaining part of the common adventure.

5. As a question of fact, the efforts for the saving of the ship were a continuous series for the common benefit, which the underwriters on the ship had a right to make, and which ended in the saving of the ship, and the completing of her unfinished voyage.

6. The efforts to save the ship, were as much made to save the whole adventure before, as after the cargo was sent up in lighters. The voyage was not terminated until the vessel reached, not the shoal on which she was stranded, but the safe harbour in New York, which first ended her voyage.

7. The vessel was not in fact a total loss, but capable of being saved, and of arriving with part of defendants' consignments at her port. She was valued in the average at $5,000.

8 No such rule can be laid down, as that the general expenses of a successful salvage should be limited to the first days work, or should be otherwise limited than that continuous and successful efforts for the saving of the adventure, embracing several parts should all be brought into a common contribution.

See *Bevan* vs. *Bank United States*, 4 Wharton, R. 301.
Belmont vs. *Nelson*, 21 New York Reports, (7 Smith. 38.)
Moran vs. *Jones*, 7 Ellis and Blackburn, 523.
Bedford C. Ins. Co., vs. *Parker*, 2 Pickering, R. 1.

The judgment should be affirmed with interest and costs.

GEO. D. LORD,
Attorney of Defendants' in Error.

ISAAC THATCHER, *et al.*

vs.

ALEXANDER MCANDREW, *et al.*

NELSON, C. J. This is, perhaps, a close case, but we are inclined to think, that on principle, the cargo of the defendants is bound to contribute in general average to the expenses of saving the vessel. The fact that the vessel stranded near the port of destination, has somewhat embarrassed the case, taken in connection with the circumstances attending the delivery of the cargo by lighters. It is open to the observation that the cargo was not only separated from the vessel and the common impending peril, before most of the expenses in relieving the latter were incurred, but that the separation took place at the instance and expense of the consignees of the cargo. This view, however, to the extent stated, is not sustained by the evidence. The cargo was discharged into the lighters to relieve the vessel; and the delivery then at the port of destination is attributable to the accident of the proximity of the port. The cargo was at the risk and responsibility of the ship until delivered by her consignees on receiving bond foraverage contribution.

Indeed, we do not understand it to be denied, but that the expenses incurred in attempting to relieve the ship, including lightering and saving cargo are properly chargeable in the general average. The point made is, that after the discharge of the cargo upon the lighters, and separation from the ship, the safety of the cargo no longer depended upon the saving of the vessel; and hence there was no longer any common peril impending or benefit derived from the expenses incurred.

That this is true in a literal sense is admitted. But is it true in a more general view of the facts of the case, or in contemplation of law? By the accident which occasioned the stranding of the vessel, both vessel and cargo were exposed to one common danger, and the expenses incurred were incurred with a view to the safety of both, and, of course, for their common benefit. Steam-tugs were employed, and efforts made to start the vessel from her sand bed—steam-pumps and wrecking apparatus used. These efforts failing, then commenced sending down yards and spars, and placing cargo into lighters. All these were expenses incurred, and efforts made by the master, who represented the interests of all concerned.

These efforts were continued by the master until and after he was joined by Captain Morris, the agent sent by the underwriters of the ship, who then took charge of the business.

The question, under these circumstances, is, is the cargo exempt from all expenses incurred in relieving the ship after it was placed in safety upon the lighters? We agree, if the consignees of the cargo had accepted it thus delivered, at the sides of the stranded ship, the separa-

tion would have been complete, and it would have been no longer connected with the danger or its incidents. But this cannot be pretended. The cargo continued as a part of the adventure not yet terminated. It cannot be doubted but if any damage had happened to it in the transfer to the lighters, or in the conveyance to the port, the loss would have been the subject of general average, and the ship liable for its share. And in this sense, the cargo is still interested, in the safety of the ship. It is said the consignees of the cargo do not claim any average contribution. But, their release or waiver cannot affect the question. The test is, is the vessel legally liable?

There is certainly a difficulty in laying down any general rule by which to determine the measure of expense the master or owner, in case of a vessel stranded by a peril of the sea, may incur, and to which the cargo saved must contribute. That expenses may be incurred, indeed, that it is oftentimes the duty of the masters or owner to incur them, is not to be denied. We do not see but the measure of them must depend upon the exercise of sound judgment, and good faith, under all the circumstances of the case. No fixed amount can be settled in advance. There may be abuses, as in every case where the rule of liability turns upon the exercises of the human judgment in the given case. The only remedy we know of consists in the supervision of the Courts. We cannot say, in this case, that the owner should have ceased his efforts when the cargo was saved, or that he forfeited his right to the contribution by the continuance of them.

Judgment for the plaintiffs for amount of verdict.